

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	1
<u>TABLE OF AUTHORITIES</u>	3
<u>STATEMENT OF JURISDICTION</u>	4
<u>STATEMENT OF FACTS</u>	5
BACKGROUND AND DISCIPLINARY HISTORY.....	5
COUNT I.....	5
COUNT II	7
DISCIPLINARY CASE.....	7
<u>POINT RELIED ON</u>	8
I.....	8
<u>POINT RELIED ON</u>	9
II.....	9
<u>ARGUMENT</u>	10
I.....	10
II.....	15
<u>CONCLUSION</u>	16
<u>CERTIFICATE OF SERVICE</u>	18

<u>CERTIFICATION: SPECIAL RULE NO. 1(C)</u>	18
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TABLE OF AUTHORITIES

CASES

<i>In re Charron</i> , 918 S.W.2d 257 (Mo. banc 1996).....	8, 12
<i>In re Conrad</i> , 105 S.W.2d 1, 13 (Mo. banc 1937).....	13
<i>In re Griffey</i> , 873 S.W.2d 600, 603 (Mo. banc 1994).....	11
<i>In re Harris</i> , 890 S.W.2d 299, 302 (Mo. banc 1994).....	10
<i>In re Kohlmeyer</i> , 327 S.W.2d 249 (Mo. banc 1959).....	13
<i>In re Lang</i> , 641 S.W.2d 77, 79 (Mo. banc 1982).....	8, 11
<i>In re Maier</i> , 664 S.W.2d 1, 2 (Mo. banc 1984).....	11
<i>In re Mendell</i> , 693 S.W.2d 76, 78 (Mo. banc 1985).....	8, 11, 14
<i>In re Murphy</i> , 732 S.W.2d 895 (Mo. banc 1987)	14
<i>In re Williams</i> , 711 S.W.2d 518, 522 (Mo. banc 1986).....	8, 11

OTHER AUTHORITIES

ABA's <u>Standards for Imposing Lawyer Sanctions</u>	13
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RULES

Rule 15.....	15
Rule 4-5.5(c)	7, 9, 15
Rule 6.01(f)	9, 15

STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent has been practicing law since 1968. T. 56. Respondent is a sole practitioner with an office on Manchester Road in St. Louis. T. 21. Six complaints were made and dismissed against Respondent between 1979 and 1995. T. 13-15. On January 9, 1997, Respondent was admonished for failing to keep a client's funds separate until a written agreement regarding dispersion was executed. T. 15-17, 20-21. Respondent accepted the admonition. T. 17.

Count I

In early 1997, James T. Piper died. Respondent was named successor personal representative of Piper's estate. T. 11. Respondent opened a checking account at Colonial Bank in his name as personal representative for Piper's estate and deposited in excess of \$100,000 in estate assets into the account. T. 11; Ex. A.

Beginning February 18, 1997, Respondent wrote forty-eight checks on the account to himself as payee, then cashed the checks for his own use. T. 83; Ex. A. Checks were written at various intervals: on successive days, more than one per day, once a month, and weekly. The amount of the checks ranged from a low of \$300 to a high of \$10,500. The last check Respondent wrote to himself out of the estate assets was on January 28, 1998. Ex. A.

In all, Respondent converted for his own use a total of \$103,182 from the Piper estate. T. 11; Ex. A. Respondent's conversion of the estate's money was a criminal act.

T. 12. In the six to eight months before taking the money, one of Respondent's business arrangements had gone bad and he had agreed to pay back taxes. Ex. 5.

Respondent filed a Statement of Account in the Probate Division of the St. Louis County Circuit Court on August 20, 1998. The Statement of Account evidenced a shortage of \$71,545.94, payable to the estate's sole beneficiary, a man named Denton Golden. T. 11; **Information**, Count I, ¶ 9; **Answer**, ¶ 9. Respondent communicated to Denton in late September, 1998, that he had mailed him a check in the amount of \$71,545.94. Respondent had not, in fact, done so. T. 11-12; **Information**, Count I, ¶¶ 10 and 11; **Answer**, ¶ 11. The Probate Court ordered Respondent to repay the estate \$82,141. Thereafter, on February 18, 1999, Respondent made restitution to the estate beneficiary. T. 12.

In July of 1999, a psychiatrist named Lawrence Kuhn diagnosed Respondent as suffering from major affective disorder, depressed-type. T. 31, Ex. 5. Respondent's lawyer had referred him to the psychiatrist for treatment. T. 27, 41. The doctor believed Respondent was depressed during the months he had been writing himself checks out of the estate account. T. 30. The doctor saw Respondent twice in July of 1999, on August 5, 1999, on October 26, 1999, and then on January 4, 2000. T. 32-33. Dr. Kuhn is treating Respondent with anti-depressant medication and believes Respondent's prognosis is good. T. 33. According to Kuhn, Respondent's illness did not impair his ability to distinguish right from wrong, but did affect his thinking and his ability to concentrate and focus. T. 34-35, 45.

Count II

As of the date of the disciplinary hearing, Respondent had not reported CLE credit hours for the reporting years 1996-1997 and 1997-1998. T. 5-8. Respondent practiced law during the years he was non-compliant with the CLE Rule. **Information**, Count II, ¶ 17; **Answer**, ¶ 17.

Disciplinary Case

A two-count Information against Respondent was filed on July 6, 1999. Count I alleged violations of Rules 4-1.15 (conversion of client's property), 4-8.4(b) (commission of criminal act), and 4-8.4(c) (dishonest, fraudulent, deceitful conduct). Respondent admitted the Count I averments in his Answer and in his hearing testimony.

Count II of the Information alleged violation of Rule 4-5.5(c) in that Respondent practiced law during years he did not report compliance with the Court's continuing legal education rules. Respondent admitted the Count II averments in his Answer.

A Disciplinary Hearing Panel held a hearing on February 25, 2000. At the end of the hearing, in a colloquy among those present, the Panel's presiding officer was asked whether he would consider recommending a one or two year suspension. He replied that he doubted such a recommendation would get "past the Supreme Court." T. 93. On March 23, 2001, the Panel issued its Findings of Fact, Conclusions of Law, and Recommendations Regarding Discipline. The Panel concluded that Respondent violated each of the Rules cited in the Information: 4-1.15, 4-8.4(b)(c), and 4-5.5(c). The Panel recommended, "at a minimum," the sanction of indefinite suspension without leave to apply for reinstatement for twelve months. The Office of Chief Disciplinary Counsel did not concur in the recommendation, prompting the filing of the record with the Court.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONVERTED OVER \$100,000 FROM AN ESTATE FOR WHICH HE WAS SERVING AS PERSONAL REPRESENTATIVE AND LIED ABOUT MAILING A CHECK TO THE ESTATE BENEFICIARY IN THAT DISBARMENT IS THE APPROPRIATE SANCTION NOTWITHSTANDING THAT RESPONDENT OFFERED EVIDENCE THAT HE WAS DEPRESSED OVER THE ELEVEN MONTHS THAT HE TOOK THE MONEY, THAT HE MADE RESTITUTION AFTER COURT ORDER, AND THAT PROMINENT WITNESSES PROVIDED TESTIMONY AS TO HIS GOOD CHARACTER.

In re Lang, 641 S.W.2d 77, 79 (Mo. banc 1982)

In re Charron, 918 S.W.2d 257 (Mo. banc 1996)

In re Williams, 711 S.W.2d 518, 522 (Mo. banc 1986)

In re Mendell, 693 S.W.2d 76, 78 (Mo. banc 1985)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONTINUED TO PRACTICE LAW IN VIOLATION OF RULE 4-5.5(C) IN THE REPORTING YEARS 1996-1997 AND 1997-1998 IN THAT RESPONDENT'S VIOLATION OF THIS RULE, IN CONJUNCTION WITH HIS OTHER PROFESSIONAL MISCONDUCT, DEMONSTRATES HIS UNFITNESS TO PRACTICE LAW.

Rule 4-5.5(c)

Rule 15

Rule 6.01(f)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONVERTED OVER \$100,000 FROM AN ESTATE FOR WHICH HE WAS SERVING AS PERSONAL REPRESENTATIVE AND LIED ABOUT MAILING A CHECK TO THE ESTATE BENEFICIARY IN THAT DISBARMENT IS THE APPROPRIATE SANCTION NOTWITHSTANDING THAT RESPONDENT OFFERED EVIDENCE THAT HE WAS DEPRESSED OVER THE ELEVEN MONTHS THAT HE TOOK THE MONEY, THAT HE MADE RESTITUTION AFTER COURT ORDER, AND THAT PROMINENT WITNESSES PROVIDED TESTIMONY AS TO HIS GOOD CHARACTER.

Unquestionably, Respondent converted over \$100,000 from an estate for which he was serving as personal representative. Equally without question, disbarment is the sanction that follows conversion, particularly conversion of the magnitude and duration unequivocally established by this record. While the principles underlying this disciplinary axiom may be well known, they bear repetition.

Protection of the public is the primary purpose of the disciplinary system. *In re Harris*, 890 S.W.2d 299, 302 (Mo. banc 1994). The “appropriate remedy for willful conversion or misappropriation of client’s funds is disbarment. . . . Honesty . . . is an all

important quality for an attorney. Situations in which a dishonest attorney could deceive a trusting client arise far too often.” *In re Mendell*, 693 S.W.2d 76, 78 (Mo. banc 1985). “Certainly where an attorney misappropriates a client’s funds, protection of the public is uppermost in our minds and disbarment is generally appropriate in such cases.” *In re Williams*, 711 S.W.2d 518, 522 (Mo. banc 1986). “Where conversion of a client’s money is involved, disbarment is the appropriate remedy.” *In re Griffey*, 873 S.W.2d 600, 603 (Mo. banc 1994). “The privilege to practice law is only accorded those who demonstrate the requisite mental attainment and moral character and, absent mitigating circumstances, an attorney who betrays the trust reposed in him for personal financial gain demonstrates he no longer possesses the requisite moral character.” *In re Maier*, 664 S.W.2d 1, 2 (Mo. banc 1984).

The Disciplinary Hearing Panel, in recommending a suspension with no leave to apply for reinstatement for one year, was apparently persuaded to make that recommendation by the medical evidence indicating that Respondent suffered from depression during the months he was writing himself checks out of the estate assets, as well as the testimony of Respondent’s prominent character witnesses and his restitution to the estate beneficiary. This Court has said that while mental illness is not a complete defense to disciplinary charges, “mental illness can and should be considered as a mitigating factor in determining what discipline to impose, provided, of course, that the primary objective of protecting the public must be achieved.” *In re Lang*, 641 S.W.2d 77, 79 (Mo. banc 1982). In Lang, the Court expressly took into account the evidence of the Respondent’s major depression in suspending the lawyer’s license with leave to apply

for reinstatement after two years. Lang's misconduct, however, is distinguishable from that sub judice. Lang was guilty of not performing legal services in six clients' cases after receiving payment for those services, and failing to return the unearned fees. Neglect, though abject and manifold in Lang's case, is a far cry from intentionally and deliberately writing forty-eight separate checks to oneself out of client's funds over an eleven month period.

In *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996), the Respondent argued depression in defense of his professional misconduct, which included paying himself \$20,000 out of an estate for which he served as personal representative without benefit of filing a claim against the estate for that amount, and paid himself for legal services rendered the estate without approval of the probate division of the court. The Charron Court recognized depression, as well as the lawyer's disorganization and loss of office personnel, as possible mitigating factors in assessing the appropriate sanction, but said such factors would not mitigate guilt. Although the Respondent in Charron was sanctioned by suspension with leave to apply for reinstatement after one year, the Court did not mention depression as a factor in reaching that result; rather, the fact that the estate in point of fact owed Respondent the money was the salient factor in the sanction analysis. There is no contention in the case at bar that Respondent was owed the money he took from the estate.

Finally, Respondent's own psychiatrist acknowledged that depression would not affect Respondent's ability to distinguish right from wrong. Rather, the illness was said to affect his thinking and his ability to concentrate and focus. This diagnosis does not

come close to explaining away, or mitigating, forty-eight separate decisions to put pen to paper and write forty-eight separate checks over an eleven month time span, and numerous trips to the bank to endorse and cash them, thereby converting the money to his own use. Respondent's reliance on his depression diagnosis is all the more questionable in light of his admission to the psychiatrist in July of 1999 that his depression may have been partly due to a business arrangement gone bad and an agreement to pay back taxes, evidence that Respondent had motive to convert funds from a quiescent estate.

The Disciplinary Hearing Panel did not explicitly rely on Respondent's stellar character witnesses and standing in the legal community or the fact that Respondent made restitution in recommending a suspension with leave to apply for reinstatement after one year. Nonetheless, in realization of the possibility that such evidence could play a role in sanction analysis, brief mention of those issues will be made. The Probate Court surcharged and ordered Respondent to repay the estate \$82,141. It was only after that order that Respondent made restitution to the estate beneficiary. Forced or compelled restitution is not a mitigating factor in sanction analysis under the ABA's Standards for Imposing Lawyer Sanctions. See Rule 9.4. Further, Missouri has long declined to accord restitution any influence in a disciplinary case, "since the theory of the law is that disbarment proceedings are not for the purpose of redressing the wrongs done the injured person nor for the punishment of the delinquent attorney." *In re Conrad*, 105 S.W.2d 1, 13 (Mo. banc 1937). See also *In re Kohlmeyer*, 327 S.W.2d 249 (Mo. banc 1959).

Evidence of a lawyer's good character and reputation, while one of the factors mentioned in the ABA Standards as possibly mitigating, can also serve to demonstrate

more vividly the tragedy of the lawyer's transgression. See *In re Mendell*, 693 S.W.2d 76, 78 (Mo. banc 1985). Such evidence should be viewed through a carefully focused lens in a self-regulating profession.

Respondent admitted lying to the estate beneficiary in September of 1998 about mailing a check for \$71,545.94 to him. As the evidence later established, the restitution monies were not paid to the beneficiary until much later, after the probate division judge surcharged Respondent for it. Misrepresentation to a client, in conjunction with other professional misconduct, was sanctioned by disbarment in *In re Murphy*, 732 S.W.2d 895 (Mo. banc 1987).

Finally, Respondent is not without a disciplinary history. He acknowledged that six complaints were filed, although ultimately dismissed, against him between 1979 and 1995. He acknowledged accepting an admonition in 1997 for depositing a settlement check in what he described as "my account" because he believed he had earned the money for additional work he had done for the client.

Respondent's conversion of more than \$100,000 from an estate by writing himself forty-eight checks out of the estate's account over an eleven month period, then lying to the estate beneficiary about sending him a check to cover his rightful proceeds from the estate, compels Respondent's disbarment, and the evidence offered by Respondent in mitigation of the appropriate sanction fails to withstand reasoned analysis. Respondent has demonstrated his unfitness to practice law, and the public should be protected by his disbarment.

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONTINUED TO PRACTICE LAW IN VIOLATION OF RULE 4-5.5(C) IN THE REPORTING YEARS 1996-1997 AND 1997-1998 IN THAT RESPONDENT'S VIOLATION OF THIS RULE, IN CONJUNCTION WITH HIS OTHER PROFESSIONAL MISCONDUCT, DEMONSTRATES HIS UNFITNESS TO PRACTICE LAW.

At hearing before the Disciplinary Hearing Panel, Respondent admitted violating Rule 4-5.5(c) by practicing law during the CLE reporting years in which he was not compliant pursuant to Rule 15. No cases were found in which the Court discussed the appropriate sanction for violation of Rule 4-5.5(c). It is noted that an automatic suspension results from nonpayment of the attorney enrollment fee. Rule 6.01(f). Because this violation does not stand alone, however, but in conjunction with the serious instances of professional misconduct outlined under Point I, Informant urges disbarment.

CONCLUSION

By writing himself forty-eight checks out of an estate account in an amount totaling over \$100,000 over an eleven month time period and cashing those checks, thereby converting estate assets to his own use, Respondent has demonstrated his unfitness to practice law. Respondent compounded his professional misconduct by lying to the estate beneficiary about sending him the money due him from the estate and by practicing law while he was non-CLE compliant. Respondent's professional misconduct by violation of Rules 4-1.15, 4-8.4(b)(c), and 4-5.5(c) is of the most serious nature and is remedial by the most serious sanction, disbarment. Respondent's prior admonition, the pattern and multiplicity of his misconduct, and his substantial experience in law practice are aggravating factors present in this case. The fact that Respondent received sporadic, infrequent treatment for the same serve to diminish the weight that should be given Respondent's mitigating evidence of a mental health problem. Likewise, Respondent's own mitigating evidence was to the effect that his condition would serve to cloud his judgment and ability to focus and concentrate, not his ability to distinguish right from wrong. The public can only be protected from a lawyer who would make forty-eight separate decisions to convert money from a vulnerable client by that lawyer's disbarment.

Respectfully submitted,

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I hereby certify that on this _____ day of _____, 2001, two copies of
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CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Special Rule No. 1(b);
3. Contains 2,985 words, according to Microsoft Word 97, which is the word
processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that
it is virus free.

Sharon K. Weedin